

John Hall, Chairman
B. J. Wynne, III, Commissioner
John E. Birdwell, Commissioner



TEXAS WATER COMMISSION

PROTECTING TEXANS' HEALTH AND SAFETY BY PREVENTING AND REDUCING POLLUTION

June 17, 1991

The Honorable Dan Morales
Attorney General
State of Texas
Supreme Court Building
Austin, Texas 78701

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Opinion Committee

Re: Opinion regarding application of ex parte
prohibitions contained in S.B. 1099

Dear General Morales:

Pursuant to Article IV, Section 22 of the Texas Constitution, the Texas Water Commission respectfully requests your opinion regarding four ex parte communication issues raised as a result of the passage of Senate Bill 1099 by the 72nd Legislature. The issues will arise in the context of contested case proceedings in which the provisions of S.B. 1099 are applicable. The particular questions for which your legal guidance is being requested are:

1. May a Hearings Examiner communicate ex parte with employees of the agency who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the agency and its staff in evaluating the evidence?
2. May a Hearings Examiner communicate ex parte with supervising attorneys within the Office of Hearings Examiners (OHE) in connection with issues of fact or law pertaining to the contested case?
3. May Commissioners or the General Counsel communicate ex parte with supervising attorneys within the OHE regarding the state of the record in a contested case following issuance of a proposal for decision?
4. If the Commission overturns an Examiner's finding of fact or conclusion of law or rejects a proposal for decision on an ultimate finding, may the General Counsel of the Commission communicate ex parte with the Examiner or a supervisory attorney within the OHE regarding the preparation of the explanation of the reasoning and grounds for such Commission action?

Background information is provided below relative to the OHE and S.B. 1099 to assist you in answering these questions.

The OHE was created pursuant to Section 5.311 of the Texas Water Code. Section 5.312 of the Texas Water Code provides that "[t]he office of hearing examiners shall be under the direction of the chief hearing examiner." The Commission currently employs twelve Hearings Examiners who are under the direction of the Chief Hearings Examiner and two Assistant Chief Hearings Examiners, all of whom are licensed attorneys.

Prior to the enactment of S.B. 1099, Examiners were expressly authorized to communicate ex parte with "employees of the agency who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the agency and its staff in evaluating the evidence." Administrative Procedure and Texas Register Act, TEX.REV.CIV.STAT.ANN. art. 6252-13a §17 (VERNON SUPP. 1991)(APTRA). It appears that Section 1.08 of S.B. 1099 could be construed as prohibiting such communication. The ex parte proscription contained in Section 1.08 is qualified in the same manner as Section 17 of APTRA, however, in that it prohibits such communications "unless required for the disposition of ex parte matters authorized by law."

It appears that the APTRA exceptions to the ex parte rule may also fall within the qualification to the ex parte prohibitions contained in Section 1.08 of S.B. 1099 in that ex parte communications authorized by APTRA are "required for the disposition of ex parte matters authorized by law." On the other hand, Section 1.08 is specifically tailored to prohibit ex parte communications between Hearings Examiners and agency employees. Additionally, if the APTRA exception remains valid, Section 1.08 of S.B. 1099 could be construed as redundant of the pre-existing broader ex parte prohibitions contained in Section 17 of APTRA.

A similar and more narrow issue exists with respect to internal communications within the OHE. Section 1.08 of S.B. 1099 specifically prohibits ex parte communications between Commission employees and the Examiner regarding issues of fact or law, as well as attempts by Commission employees to influence an Examiner's findings of fact or his application of the law or rules. In situations not governed by S.B. 1099, the Commission believes communications between supervising attorneys and Examiners are authorized pursuant to Section 17 of APTRA because supervisory attorneys have special skills or knowledge of the agency and do not participate in contested case hearings; however, if the APTRA exception to the ex parte rule does not apply to hearings governed by S.B. 1099, substantive discussions between Examiners and supervisory attorneys may be prohibited.

The Commission is concerned that such an interpretation of S.B. 1099 would create a serious problem. The OHE takes pride in the quality of the work product of its Examiners, and the Examiners's final substantive recommendation to the Commission is, of course, always his or her own. Nevertheless, in light of salary limitations within the agency, Hearings Examiners are frequently inexperienced attorneys when they are hired.

The importance of this issue is increased by other provisions of Section 1.08 of S.B. 1099, which add Subsections 361.0832(c) and (d) to the Health and Safety Code. These new subsections provide that the Commission may reject an Examiner's findings of fact only if they are not supported by "the great weight of the evidence," and may overturn a conclusion of law only if it was "clearly erroneous...." Under such circumstances, the Commission believes that it is important that supervising attorneys who do not participate in the case be allowed to substantively discuss the case with the Examiner to whom the case has been assigned.

Under the foregoing circumstances, the Commission believes that, in addition to the APTRA exception to the ex parte rule, the statutory structure of the Office of Hearings Examiners, with the office placed "under the direction of the chief hearing examiner," seems to recognize the necessity of such communication, and could be construed as otherwise authorizing and requiring ex parte communications within the Office of Hearings Examiners.

The third issue also relates to the relationship between Section 1.08 of S.B. 1099 and Section 17 of APTRA. Pursuant to APTRA, ex parte briefings of Commissioners or the General Counsel by supervising attorneys from the Office of Hearings Examiners appear to be an appropriate use by the Commission of the special skills or knowledge of the agency which are possessed by these supervising attorneys. Because the Commissioners and General Counsel are not ordinarily present during evidentiary hearings conducted by Examiners, private discussions between individual Commissioners or the General Counsel and supervisory attorneys from the OHE are useful in providing the Commission with answers to specific questions regarding the status of the evidentiary record. The Commission is concerned, however, that, depending on the nature of prior communications between the Examiner and the supervising attorneys, such briefings could be construed as indirect ex parte communication between the Examiner and Commission members in violation of Section 1.08 of S.B. 1099.

If the communication were with the General Counsel, who then briefed the Commission with respect to legal matters raised by the state of the record, the potential ex parte character of the communication would be more attenuated. Additionally, legal briefings of Commissioners by the General Counsel in contested case administrative settings were expressly approved by the court in

Galveston County v. Texas Department of Health, 724 S.W.2d 115, 124 (Tex.App.--Austin 1987, writ ref'd n.r.e.). In order for the legal advice offered by the General Counsel to be meaningful, especially to a non-lawyer Commissioner, the advice would need to apply the law to the particular facts of the case at hand. Consequently, the Commission believes that the General Counsel should be allowed to discuss the state of the record with supervising attorneys within the OHE in order to meaningfully brief the Commissioners regarding the application of the law to the facts.

The fourth issue is raised by virtue of Section 1.08 of S.B. 1099, which adds Section 361.0832(f) to the Health and Safety Code. This new subsection requires the Commission to fully explain the "reasons and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding."

Prior to the enactment of S.B. 1099, the Commission was already required by Section 16(b) of APTRA to issue orders in contested cases which contain separately stated findings of fact and conclusions of law which support issuance of the order. The basis for the Commission's rejection of the Examiner's findings and conclusions can therefore be discerned by a comparison of the Examiner's proposed order with the order as actually issued by the Commission. Consequently, it appears unclear how much additional explanation is required by the Commission when it rejects an Examiner's proposed findings and conclusions.

If the new legislation envisions a more detailed discussion by the Commission of its basis for rejecting the Examiner's proposed findings and conclusions, ex parte problems could arise with respect to the drafting of such a detailed document. In such situations, the Commissioners generally discuss in open meeting their reasons for disagreeing with the Examiner. The Commission then typically instructs the General Counsel to work with the Examiner to draft a final Order in accordance with the Commission's directions. The rationale for including the Examiner in the preparation of the Order is that the Examiner is intimately familiar with the record, and the General Counsel's office is insufficiently staffed for such an undertaking. The General Counsel's office currently consists of the General Counsel and one additional part-time attorney. Consequently, the question arises whether discussions between the Office of the General Counsel and the Office of Hearings Examiners regarding the drafting of the explanatory document would violate the ex parte rule. Such discussions would occur after the Examiner has issued his proposal for decision and presented it to the Commission in open meeting.

In light of the importance of the questions raised with respect to currently pending matters and the immediate need for the Commission to comply with the requirements of S.B. 1099, which became

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effective on June 7, 1991, the Commission respectfully requests your expedited consideration of the issues presented. The Commission appreciates your assistance with respect to the resolution of these matters.

Respectfully,

A handwritten signature in cursive script that reads "John Hall". The signature is written in dark ink and is positioned above the printed name and title.

John Hall
Chairman, Texas Water Commission